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VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

Issued Monthly at \$5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at University Station, Charlottesville, Va.; BUSINESS communications to the PUBLISHERS.

IN a recent editorial comment on the power of the State to enforce compulsory vaccination (3 Va. Law Reg. 606), though unable to cite authority directly in point, we questioned the constitutionality of legislation conferring such power upon boards of health or other public functionaries. Numerous authorities however were cited, maintaining the right of the State to require vaccination as a condition precedent to the enjoyment of certain public privileges—such as attendance upon the public schools, admission to public hospitals, etc.

The precise question as to the constitutionality of a statute conferring power upon a municipal corporation to enforce compulsory vaccination against all persons within its limits, whenever an epidemic of smallpox exists or is reasonably apprehended, has subsequently come before the Supreme Court of Georgia, and the validity of the statute is sustained. *Morris v. City of Columbus*, 30 S. E. 850. The court found no case directly decisive of the question, but applied the principle that the police power includes “everything essential to the public safety, health and morals, and justifies the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.” *Lawton v. Steele*, 152 U. S. 133. The court also relied upon the authorities which uphold the right to exclude persons not vaccinated from certain public privileges, and held that there was no material distinction between this right of exclusion and the power to fine and imprison for failure to submit to inoculation. While the parallel between the two cases is not perfect, the reasonable exercise of the power, under proper circumstances, is so salutary, that we shall not be sorry to see the right generally acknowledged throughout the country.

IN the death of Judge Thomas M. Cooley, which occurred September 12, the legal profession of America loses one of its most distinguished and valuable members. While he had occupied and adorned

many positions of public trust and confidence, he is best known to the legal profession for his masterly writings on legal subjects, the most conspicuous of which is his great work on Constitutional Limitations. Other well-known works are his "Law of Taxation," "Law of Torts," "General Principles of Constitutional Law," and editions of Blackstone's Commentaries and of Story's Commentaries on the Constitution of the United States. He served three terms on the Supreme Court of Michigan; was for many years a professor in the Law Department of the University of Michigan; and was by appointment of President Cleveland a member of the Interstate Commerce Commission. The *National Corporation Reporter*, in an extremely appreciative notice of his death, says of him:

It was Judge Cooley who taught the generations of the present day how to think correctly on constitutional questions, and his teachings have been obeyed far and wide, as if spoken by an inspired oracle. American Constitutions of the latter day have interwoven into their fabric many of the limitations, which this judicial seer pointed out to the listening audiences of the nation, and constitutional lessons will be remembered by future generations with admiration of the scholar and benefactor of the American commonwealths. We cannot imagine the full stature of American jurisprudence, without measuring the invaluable aid it received in its upbuilding through his master mind. He stands out as the classic of American lawyers, and his works will remain the classics of American jurisprudence. No encomium which may be pronounced by the people will exceed the true measure of his work, and he has broadly gained the immortality which will be undimmed as the ages go on. Biographical data will reveal a most active life, and include the lowest and highest stations.

Starting as a farmer boy, he became a lawyer, politician, editor, reporter, farmer, statistician, court-reporter, professor, author, jurist, Justice of the Supreme Court, and member of the Interstate Commerce Commission. He was a striking instance of a wonderful natural bent of mind, returning after every digression to the great work of the law, for which nature had so well fitted him, and it may be truly said that on the day of his death Judge Cooley ranked as the foremost legal mind among American lawyers.

A QUESTION of no little interest to the commercial world has recently been decided by the Court of Civil Appeals of Texas, in *Landa v. Lattin* (46 S. W. 48). And though arising out of a transaction which is of daily occurrence in business circles, the case seems to be one of first impression in America. The facts were, briefly, that a grain dealer sold to a customer in another State a car-load of "sound, sweet" wheat, at an agreed price—to be consigned to shipper's order, with draft attached to the bill of lading, and collected through the banks, according to the usual course of business. The seller shipped

the wheat accordingly, taking the bill of lading in his own name. The draft, with the bill of lading attached, was then discounted by a local bank, and forwarded to a bank at the buyer's place of residence for collection. The buyer paid the draft, received the bill of lading, duly indorsed to him, and upon presentation of the bill of lading the wheat was delivered to him by the carrier. Upon examination, the wheat was found to be "musty and inferior." Thereupon the buyer brought a joint action for breach of contract against the seller and the bank which had discounted the draft. The main question presented was whether the bank, by reason of its having become owner of the bill of lading, rested under any liability to make good the original contract between seller and buyer.

The court held that upon indorsement of the bill of lading to the defendant bank, the latter became owner of the goods, and, by indorsement of the bill of lading to the buyer, assumed the attitude of an assignee of the original seller, with all of the liabilities attaching under the original contract of sale, and hence was liable for such damages as resulted from the breach of the contract.

As a bill of lading is not a negotiable instrument, the decision of the court would seem to be right. The assignee should not be permitted to accept the benefits of the original contract of sale without the corresponding burdens. The banking world will doubtless take careful note of the decision.

WE publish elsewhere in this number, the second and last installment of Mr. Saunders' elaborate justification of the necessity and constitutionality of the recent Act of the Virginia legislature, attempting to deprive the courts of the power to punish contempts.

That the necessity for such radical legislation exists, or ever existed, in Virginia, it is simply idle to argue—certainly before the lawyers of this State. The Virginia people—indeed, we may say the American people—need no legislative champions to stand between them and the judges whom they have selected to preside over their courts. If, here and there, in rare instances, there has been an abuse of the power to punish for contempt, surely the remedy is not to take away from the courts their ancient and essential right of self-protection. As well abolish trial by jury because the prejudices of juries sometimes result in a miscarriage of justice.

We venture the assertion that few candid and intelligent lawyers in Virginia believe this Act was passed because it was needed, or for any

other reason than in response to the plank against Government by Injunction in the Chicago platform.

As to the constitutionality of the Act, Mr. Saunders' argument, read without reference to the authorities, is most plausible. The gist of the argument rests upon a comparison of the powers of Congress over the lower Federal courts and the powers of the Virginia legislature over the State courts. And, as the Supreme Court of the United States held in *Ex parte Robinson*, 19 Wall. 505, that the Circuit and District Courts of the United States are creations of Congress and therefore subject to the control of Congress in the matter of contempt proceedings, so, it is argued, the Virginia courts are likewise subject to similar legislative regulation—since the language of the two constitutions, with respect to the establishment of courts, is substantially similar.

On the contrary, a comparison of the two shows a wide dissimilarity. The United States Constitution provides that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish." Art. III, sec. 1. In *Ex parte Robinson (supra)*,—which was an *ex parte* proceeding by an attorney who had been disbarred for contempt, in which no counsel appeared on the other side, so far as the report discloses, and in which the constitutional question is not discussed—the Supreme Court of the United States held that the power of the lower Federal courts to punish contempts might be regulated by Congress. The court was careful to say, however, under the language of the Constitution just quoted, "the judicial power *shall* be vested in one Supreme Court and in such inferior courts as the Congress *may* from time to time ordain and establish," that the Supreme Court derived its existence and powers from the Constitution, and that it was doubtful whether such legislation could affect that court. In other words, that the Supreme Court was a constitutional one. Thus it would seem that the Constitution left it discretionary with Congress to establish inferior courts or not as it might see fit, but there was no such discretion as to the Supreme Court.

The Virginia Constitution provides that "there *shall* be a Supreme Court of Appeals, *circuit* courts and *county* courts," with the further provision that the jurisdiction of each of these shall be regulated by law, except so far as conferred by the Constitution. Art. VI, sec. 1. Then follow a number of provisions with reference to the jurisdiction of the Court of Appeals—the division of the State into judicial cir-

cuits (*Ib.*, sec. 9)—specific provisions as to the election and term of office of circuit judges (*Ib.*, sec. 11)—a provision that “a circuit court *shall* be held at least twice a year . . . in every county or corporation wherein a circuit court now is or may hereafter be established” (*Ib.* sec. 12)—and similar mandatory provisions with reference to the establishment of county and corporation courts (*Ib.*, secs. 13, 14). If the language of the United States Constitution that “the judicial power . . . shall be vested in one Supreme Court” makes that court a constitutional one, with its power of punishing for contempt beyond Congressional legislation, *a fortiori* are the courts established under the even more mandatory language of the Virginia Constitution likewise constitutional courts, with like exemption from legislative interference in the matter of contempts, and particularly of such contempts as challenge the power of the court to enforce its own lawful orders. Who doubts that if the legislature should attempt to abolish all the circuit and corporation courts of the State, without substituting others in their places, the attempt would be declared an infringement of the Constitution? If so, are not these courts constitutional courts? And if so, has the legislature the power, after establishing them, to so hamper their power to protect themselves and to enforce obedience to their process as to leave them mere shadows, wanting those powers which are essential attributes of every court? It has not been held, and probably never will be, that Congress possesses any such power even over the lower Federal courts.

When the right to punish contempts, as at common law, is claimed for our courts, it is not meant to imply that the character and extent of the punishment is without limit, as at common law,—but, as was well said by the Supreme Court of Arkansas in *Neel v. State*, 4 Eng. 263, “only to an extent not wholly inconsistent with those great principles upon which our free institutions, purely American, have been reared and maintained. So these doctrines which we are considering (power to punish contempts), in being recognized by the courts must be regarded as having received a corresponding abatement of those of its lineaments which are at open war with the nature and character of our constitution, and the actual state of things among us, under its legitimate operation, or it would be an exotic that could not germinate in our soil.”

Undoubtedly there are cases which uphold the right of the legislature to reasonably regulate the exercise of this power by the courts—possibly even in the case of courts ordained by constitutional enact-

ment—but we challenge the production of any authoritative utterance by any American court, maintaining the power of the legislature to substantially destroy the efficiency of a court established in response to the imperative mandate of the Constitution—as, for example, by taking away from it the power to compel obedience to its lawful process, as in the case of this Virginia Act. Under the Act the court may itself punish disobedience of an “officer of the court, juror or witness, to any lawful process, judgment, degree or order of the said court,” *but not disobedience of the defendant himself!* And, worse still, if the defendant fails or refuses to obey any mandate of the court, requiring affirmative action on his part, the court itself has no means of compelling obedience, but a jury is to pass upon the contempt and fix the punishment. Mr. Saunders fails to solve the difficulty mentioned in our previous comment on the statute (4 Va. Law Reg. 49), where the jury in such case bring in a verdict of guilty, and assess the punishment at, say, thirty days in jail. The recalcitrant serves out the sentence, but obstinately and contemptuously refuses to obey the order. Nothing short of power to hold him in confinement *until he obeys* will answer the necessities of the case. Yet having served the brief sentence imposed by the jury, he is purged of the contempt, and is entitled to complete immunity from further prosecution.

We again ask, what becomes of the order, disobedience of which constituted the contempt? How is it to be enforced? And what position does the court occupy toward the world? What respect would the people thereafter have for the courts?